

CALENDAR ITEM

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CONSIDER OPPOSING FEDERAL LEGISLATION THAT WOULD PROHIBIT STATES FROM ADDRESSING INCIDENTAL VESSEL DISCHARGES, INCLUDING BALLAST WATER, WITHIN STATE WATERS AND PREVENT STATES FROM ENFORCING CORRESPONDING PROVISIONS OF FEDERAL LAW

INTRODUCTION:

This staff report summarizes the Commercial Vessel Incidental Discharge Act (S. 168; Senator Wicker) and recommends that the Commission oppose this bill and any proposed federal legislation that is similar in form and function to this bill. S. 168, introduced on January 17, 2017, in the 115th United States Congress, would preempt states' authority to address vessel discharges within state waters and imperil California's efforts to prevent the release of nonindigenous species into state waters.

BACKGROUND:

California's coast, waterways, and ocean ecosystems are among the most beautiful and bountiful in the world. From the coast of Humboldt, to the San Francisco Bay, to the southern California beaches and San Diego Bay, millions of people visit California's coasts and estuaries each year. Visitors and residents spend money on tourism and recreation, dine at local restaurants serving California-sourced seafood, and enjoy kayaking, swimming, boating and other water-dependent activities that depend on healthy coastal ecosystems. California is the sixth largest economy in the world, has the second largest ocean-based gross domestic product in the nation, and ranks number one for employment and second in wages. Ocean-based tourism and recreation industries accounted for almost \$18.4 billion of California's gross domestic product in 2013, according to information from the National Ocean Economics Program.

California is a major gateway for products entering and leaving the United States. According to the California Association of Port Authorities, international trade at California's ports account for nearly 25 percent of California's economic activity and goods moving through ports, such as industrial and postconsumer secondary materials, originate in other states and countries. As vessels move from port to port, so do the organisms that attach to or are entrained in those

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vessels. It is estimated that before vessel vector management programs, such as California's Marine Invasive Species Program, over 7,000 species were moved around the world on a daily basis owing to shipping activity. In California, the shipping industry is responsible for approximately 81 percent of invasive species introductions in state waters.

Invasive species introductions from commercial vessels are a significant threat to the health and safety of state waters, international trade, navigation, tourism and recreation. In 1999, the Legislature directed the Commission to develop and administer a program to manage commercial vessel discharges of ballast water and to, as expeditiously as possible, prevent invasive species release into California waters. Other states have followed suit and established programs to manage vectors of introduction. These programs are consistent with many federal laws that recognize states interests to regulate their own waters, such as the Nuisance Prevention and Control Act of 1990, reauthorized as the National Invasive Species Act, and the federal Clean Water Act.

The Commission's Marine Invasive Species Program manages commercial vessel discharges to limit the spread of invasive species. As directed by the Legislature, staff develops and implements state specific practical and progressive strategies to limit the introduction and spread of invasive species from commercial vessels, rather than relying on a one-size-fits-all national governance. This approach is consistent with the National Invasive Species Act and the Clean Water Act, which recognizes that states' have a vested interest in protecting and preserving their state waters and that states can establish requirements that provide more stringent and more specific protections of their waters.

STAFF ANALYSIS AND RECOMMENDATION:

The intent of S. 168 appears to be to preempt states' existing authority to regulate discharges incidental to the normal operation of commercial vessels, including ballast water, and to prevent states from enforcing any statute, regulation or other requirement relative to these discharges. S. 168 would supersede any current or future state statute, regulation, or other requirement with respect to ballast water discharges into the navigable waters of the United States and other discharges incidental to the normal operation of commercial vessels. S. 168 would require the Secretary of the department in which the Coast Guard is operating (currently the Department of Homeland Security) to administer and enforce national discharge standards and requirements. The Secretary may enter into an agreement with the Governor of a State to authorize

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the State to enforce provisions of the Commercial Vessel Incidental Discharge Act, but leaves that entirely to the secretary's discretion, making this provision meaningless.

S. 168 creates one national standard for the regulation of discharges incidental to the normal operation of a vessel. Since S. 168 imposes a single national discharge standard, it would preclude states from enacting state-specific standards, and would supersede California's existing standard. The Governor of a State may petition the Secretary of the department in which the Coast Guard is operating to conduct a review to determine if new information is available to indicate if the federal ballast water discharge standard could be revised to result in a reduction in the risk of the introduction or establishment of invasive species; however, the requirements make it virtually impossible for the Secretary to determine that a stricter standard could ever be practicable.

Under the Bill, the Secretary, in consultation with the Administrator of the U.S. EPA, must conduct a practicability review by January 1, 2022 to determine if revising the ballast water discharge standard would result in a reduction in the risk of the introduction or establishment of invasive species. A specific risk, however, cannot be applied to a specific standard. According to a 2011 National Research Council Report, there is no established scientifically accepted relationship between a specific discharge standard and risk of species introductions. It is thus unlikely that the national standard will change.

Staff recommends the Commission oppose federal legislation that would prohibit states from regulating incidental vessel discharges, including ballast water, within state waters and that would prevent states from enforcing corresponding provisions of federal law.

OTHER PERTINENT INFORMATION:

1. On January 24, 2017, the Senate Committee on Commerce, Science, and Transportation approved the bill. S. 168 is unlikely to proceed as a stand-alone bill; its provisions will most likely be attached as an amendment to a broader bill that may or may not be related to the subject matter. A potential vector is the Coast Guard Reauthorization Act.
2. The Commission has opposed similar legislation that was introduced in former sessions of Congress, primarily because the legislation ran afoul of established precedent allowing states to protect their own waters. The

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preemption provisions in S. 168 would likely dismantle California's Marine Invasive Species Program, discharging the Commission from implementing a world-leading program that reduces the risk of aquatic invasive species introduction into California's waters.

3. This action is consistent with Strategy 1.1 of the Commission's Strategic Plan to deliver the highest levels of public health and safety in the protection, preservation and responsible economic use of the lands and resources under the Commission's jurisdiction and with Key Action 1.1.3 of the Commission's Strategic Plan to Implement Ballast Water Discharge Performance Standards and biofouling management strategies that prevent the introduction of non-indigenous species into State marine waters.

RECOMMENDED ACTION:

It is recommended that the Commission:

1. Oppose federal legislation that would prohibit states from addressing incidental vessel discharges, including ballast water, within state waters and that would prevent states from enforcing corresponding provisions of federal law.